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May 2, 2017

Ajit Pai, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 02-6, Request for Waiver of the Tennessee E-Rate Consortium

Dear Mr. Chairman,

This firm represents the forty-three Tennessee school systems that remain concerned about a pending denial of E-rate funds; a denial that was first appealed to the Commission in 2012.¹ The Director of Schools (Superintendent) of one of those member schools, Mr. Michael Davis of the Hardin County (TN) school system recently attended a Broadband Summit that Congressman Blackburn hosted in Columbia, Tennessee. You graciously came to Tennessee and spoke to a group of community leaders at that Summit. Mr. Davis asked you for status on the 2012 waiver request and you asked him to email your office. [See attached.] He emailed the FCC on February 27, 2017 and I subsequently filed a copy of this communication as an *ex parte* communication on my client's behalf. To date, Mr. Davis has not received a reply from the FCC on this matter. The other consortium member school districts ask me almost daily for a status report on this issue.

Please let me know when you can provide a status update to me so that I can provide the information to the Sweetwater Consortium. The attached summary documents contain further details of the issue; the original email from Mr. Davis; and the *ex parte* communication. Because this issue sits squarely at the Commission, I know that you and your staff have the ability to provide relief to the schools.

Contact me with any questions you may have.

Very truly yours,

Charles W. Cagle

¹ *Request for Waiver of the Tennessee E-Rate Consortium* in CC Docket No. 02-6 (filed Feb. 11, 2013); *Supplement to Request for Waiver* (filed Dec. 17, 2013) ("2012 Waiver Request").

cc: Mr. Michael Davis, Superintendent Hardin County Schools
The Honorable Marsha Blackburn, U.S. House of Representatives (TN)
Charles Flint, Legislative Director and Counsel, Congressman Blackburn
Rachel Bender, Wireless Advisor
Dr. Jay Schwarz, Wireline Advisor
Kris Monteith, Wireline Bureau Chief
Sweetwater Consortium Member School Districts

Summary of Tennessee 2012 Waiver Request

USAC denied 43 Tennessee school districts' ability to join an existing consortium to access services eligible for E-rate funding. The districts' only error was relying on USAC to provide guidance as to the program rules. Hardin County and the rest of the 42 school districts are still waiting on a response. Given the hardships these delays in funding have caused the districts and their students, we respectfully urge the Wireline Competition Bureau grant the outstanding appeal expeditiously.

This relief, at this point, would simply allow these *eligible* districts to receive funding for *eligible* services they received that were purchased from a contract that was formed completely in compliance with E-rate rules – a contract that USAC had no issues with for the 79 other school districts that took service using its terms for four years.

The facts and law are as follows:

In 2011, 79 school districts in Tennessee joined together to form the Tennessee Consortium ("Consortium"). Upon its creation, the Consortium applied for E-rate support by posting an FCC Form 470 and a Request for Proposals ("RFP") on February 4, 2011 for funding year 2011-2012.² Some months later, the 43 additional school districts sought to join the existing Consortium after their existing contract had expired.³

Joining the Consortium would save them the effort of rebidding for Internet access and telecommunications services and would allow them access to the best pricing in the state due to greater purchasing power of a larger contract. There is no program rule that prohibits new members from joining a consortium after the competitive bidding process has been completed.⁴ To the contrary, it has been Commission policy to encourage Consortium applications.

The Consortium Lead participated in a USAC annual E-rate training session in September 2011, in which one of USAC's slides seemed to confirm his understanding of the rules, that additional members could indeed join the Consortium prior to the filing of each school district's application. Making sure he properly interpreted the guidance, the Consortium Lead then exchanged a series of follow-up emails in which USAC management executives confirmed twice that new members could join and take service under the existing multi-year contract without having to undergo a completely new competitive bidding process, provided that the new consortium members' letters of agency (LOAs) were signed and completed by the

² FCC Form 470 Application Number 534070000900066 (posted Feb. 4, 2011); Metropolitan Nashville Public Schools Request for Proposal No. 11-4 (Feb. 4, 2011).

³ Waiver Request at 3.

⁴ Neither the Commission's E-rate rules in effect in 2011-2012, nor the revised rules adopted in the Commission's recent *E-rate Modernization Order* indicate any intention to freeze the membership of a consortium. The Commission issued an order in 2006 that indicated members could not join a consortium in the middle of a funding year, but indicated no prohibition on members joining at the beginning of a funding year. *Request for Waiver of the Decision of the Universal Service Administrator by Kan-ed, Kansas Board of Regents*, CC Docket No. 02-6, Order, FCC 06-170 (2006) (*Kan-ed Order*).

Form 471 certification postmark date, as required by Commission precedent.⁵ Adhering to this guidance from USAC, the 43 new members executed LOAs with the Consortium and then timely submitted individual FCC Forms 471 for funding year 2012, referencing the Consortium's February 2011 Form 470.

USAC then surprisingly denied E-rate funding to these applicants for funding year 2012, claiming that "the addition of your [school district] would cause a change in the scope of services sought in the solicitation. Program rules require that [school districts] on a FCC Form 471 must be listed in . . . the cited FCC Form 470 that established the competitive bidding process." The forms do not appear to require such a result and USAC failed to cite to an FCC rule supporting its position. Further, the districts' use of the contract did not change the "scope of services." The districts purchased telecommunication and Internet access. If the districts had joined the Consortium the year before, it would have had zero effect on which carriers bid to provide the services. As several competitive bidding processes have subsequently borne out, only two carriers have submitted bids for the scope of services requested in the Tennessee Consortium RFP – AT&T and Education Networks of America ("ENA"). Both of those carriers participated in the 2011 Tennessee Consortium bidding process.

On the advice of the Wireline Competition Bureau, the 43 school districts filed the pending appeal, asking the Commission to waive any applicable Commission rules to allow the districts to receive E-rate funding for funding year 2012. The waiver request set forth the legitimate and rational reasons why the Commission should grant the relief requested.

As noted above – and it bears repeating – this relief, at this point, would simply allow these *eligible* districts to receive funding for *eligible* services they received that were purchased from a contract that was formed completely in compliance with E-rate rules – a contract that USAC had no issues with for the 79 other school districts that used it for four years.

Most critical to the analysis of the waiver request should be two points:

(1) The grant of this appeal would further E-rate program goals by allowing these districts to receive funding they can use to pay for advanced telecommunications and Internet access services that benefit their students. Absent any harm to the fund, there is simply no reason why the Commission should deny these districts funding they are otherwise entitled to under the statute and Commission rules.

(2) Here, USAC provided – more than once – guidance that the applicants followed that resulted in the denial. This guidance was not provided by a low-level staff member at USAC, but was *written* guidance by senior management that "[i]t is permissible under E-rate rules to allow those other members to join the Tennessee E-rate Consortium. It is not uncommon for members to join or leave a consortium after the competitive bidding and vendor selection is completed."⁶

⁵ 2012 Waiver Request at pp. 3-4; *see also Kan-ed Order*.

⁶ 2012 Waiver Request.

Even if the Commission believes some program violation occurred, there is ample evidence here to demonstrate that the public interest waiver standard has been met. Of course, the Commission cannot always grant an appeal simply because an applicant relied upon incorrect USAC advice. For example, if someone at USAC told an school that a school employee could accept \$500 from a service provider in exchange for selecting that company, and the employee did so, the Commission would not be serving program interests to allow that bribery to occur. In this case, however, no such violation of Commission rules or program integrity exists. As the districts have explained in their waiver petition, there was no waste, fraud and abuse, and the applicants relied upon USAC advice in good faith.

As such, the districts respectfully renew their request for a waiver of whatever rules the Commission believes may have been inadvertently violated. Given the passage of time, we request such a decision be issued as expeditiously as possible.